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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MICHAEL LAZARIN, STEPHEN KOHLER,
and PAUL CAPANO on behalf of themselves
and all others similarly situated,

Plaintiffs,

v.

PRO UNLIMITED, INC. and JUNIPER
NETWORKS, INC.

Defendants.

No. 5:11-cv-03609 HRL

**PLAINTIFFS' NOTICE OF MOTION
AND MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
APPROVAL OF CLASS AND
COLLECTIVE ACTION SETTLEMENT**

Date: June 5, 2012

Time: 10:00 a.m.

Judge: Honorable Howard Lloyd

Courtroom: 2 – 5th Floor

TO THE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 5, 2012, at 10:00 am, or as soon thereafter as the matter may be heard in the courtroom of the Honorable Howard Lloyd, in Courtroom 2 of the United States District Court for the Northern District of California, located at 280 S. 1st Street, San Jose, California, Plaintiffs will and hereby do make this unopposed motion for an order from this Court granting preliminary approval of the proposed class and collective action settlement in the above-entitled litigation pursuant to Fed. R. Civ. P. 23 and 29 U.S.C. §§ 201 et seq. Through this motion, Plaintiffs seek an order from the Court: (1) granting preliminary approval of the proposed settlement; (2) conditionally certify for settlement purposes an FLSA Settlement Class; (3) conditionally certify a California Class for settlement purpose; (4) approving the form, content and method of distribution of the Notice; (5) appointing Simpluris, Inc. as the Claims Administrator; (6) appointing Rukin, Hyland, Doria & Tindall LLP as settlement Class Counsel, and (7) scheduling a hearing regarding final approval of the proposed settlement and Class Counsel's request for attorney's fees, costs, and enhancement award payments.

This motion is based on the concurrently filed memorandum of points and authorities, the declaration of Peter Rukin all other pleadings and papers on file in this action, and such argument as the court may hear.

Dated: April 20, 2012

Respectfully submitted,

RUKIN HYLAND DORIA & TINDALL LLP

By: /s/ Peter Rukin
Peter Rukin

1 I. INTRODUCTION

2 This motion seeks provisional certification of a class and collective action and preliminary
 3 approval of a settlement which will provide significant financial benefit to employees of PrO
 4 Unlimited, Inc. (“PrO”) and Juniper Networks, Inc. (“Juniper”) (collectively “Defendants”) who
 5 were not paid for overtime hours worked. Plaintiffs Michael Lazarin, Stephen Kohler, and Paul
 6 Capano (“Plaintiffs”), on behalf of themselves and the proposed Class have entered into a
 7 Settlement Agreement (“Settlement” or “Settlement Agreement”) with PrO that provides for a
 8 lump sum cash settlement of \$1,250,000 in return for a release and dismissal with prejudice of the
 9 claims alleged against PrO and Juniper in this action. The Net Settlement Fund will be distributed
 10 to the approximately 50 Class Members who worked for Defendants during the class period based
 11 on the number of work weeks class members’ worked during the class period and their average
 12 weekly pay.

13 Plaintiffs and Class Members worked for PrO as Contingent Employees at Juniper.
 14 Defendants treat Contingent Employees as exempt from the overtime requirements of federal and
 15 state law and fail to pay them premium rate for the overtime hours they worked. Plaintiffs
 16 challenge this pay practice on the grounds that Defendants allegedly did not pay Contingent
 17 Employees on a true “salary basis” within the meaning of the federal Fair Labor Standards Act
 18 (“FLSA”) and California law, but instead allegedly reduced Contingent Employees’ compensation
 19 based on the quantity of work the employer provided.

20 The proposed Settlement is fair and reasonable in light of the risks Plaintiffs and Class
 21 Members face in connection with the class certification and liability phase of this Case. A
 22 determination that Contingent Employees were in fact paid on a salary basis would effectively
 23 dispose of the overtime claims of Plaintiffs and Class Members. Plaintiffs’ counsel believes that
 24 the Settlement – negotiated at arm’s length – is a fair and reasonable resolution of the claims in
 25 light of this risk. Accordingly, Plaintiffs respectfully request that the Court (1) grant preliminary
 26 approval of the proposed settlement; (2) conditionally certify for settlement purposes an FLSA
 27 Settlement Class; (3) conditionally certify a California Class for settlement purpose; (4) approve
 28

the form, content and method of distribution of the Notice; (5) appoint Simpluris, Inc. as the Claims Administrator; (6) appoint Rukin, Hyland, Doria & Tindall LLP as settlement Class Counsel, and (7) scheduling a hearing regarding final approval of the proposed settlement and Class Counsel's request for attorney's fees, costs, and enhancement award payments.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background and Parties' Contentions

PrO Unlimited, Inc. specializes in placing and managing contingent employees at its customers' worksites around the globe. Juniper Networks is a customer of PrO Unlimited headquartered in Sunnyvale, California.

Each of the representative Plaintiffs was employed by PrO Unlimited to work exclusively for Juniper Networks, was designated as a Contingent Worker, and was involved in performing support functions (such as recruiting and staffing) for Juniper. *See* Docket Number ("Dkt. No.") 5, at ¶ 16 (First Amended Complaint). Plaintiff Michael Lazarin worked for Defendants at Juniper as a Recruiter from approximately March, 2008 to approximately November, 2009 and again from approximately October, 2010 to January, 2011. *Id.* at 10. Plaintiff Stephen Kohler worked for Defendants at Juniper as a Senior Staffing Manager from October, 2008 through October, 2009. *Id.* at 11. Plaintiff Paul Capano worked for Defendants at Juniper as a Recruiter from August, 2008 to January, 2010. *Id.* at 12.

Plaintiffs contend that Defendants classified Contingent Employees as exempt from overtime and failed to pay them the premium overtime rates required by federal and California law. Plaintiffs further contend that Contingent Employees were not compensated on a salary basis; rather, they allegedly were compensated based on the quantity of work the employer provided, and their wages allegedly were subject to reduction because of variations in the quantity of work performed.

Plaintiffs allege that Defendants misclassified Contingent Employees¹ as exempt from

¹ The Contingent Employees covered by this Settlement include only those employees who worked in the following job titles: Agency Finance Management; Agency IT Management; Agency Marketing Management; Agency Recruiter; Agency Talent Acquisition; Agency Talent Acquisition-Recruiter; Contract Recruiter-APG; Contract Sr. Technical Recruiter; Manager, Contingent Workforce; Marketing Contractor; Recruiter; Sr. Recruiter; Sr. Talent

overtime because Contingent Employees allegedly were not guaranteed a weekly wage that was not subject to deduction based on the time worked each week, and that these less-than-salary-equivalent payments allegedly reflect a pattern or practice of salary basis violations, rendering Contingent Employees nonexempt from federal and California overtime requirements. See 29 C.F.R. § 541.602(a) (“an employee will be considered to be paid on a ‘salary basis’ within the meaning of [federal overtime] regulations if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employees compensation, which amount is not subject to reduction because of variations in the quality or quantity of work performed.”); *Block v. City of Los Angeles*, 253 F.3d 410, 419 (9th Cir. 2001); *Klem v. Cnty. of Santa Clara*, 208 F.3d 1085, 1089 (9th Cir. 2000).

Defendants contend that Plaintiffs’ claims are without merit, and assert factual and legal defenses to Plaintiffs’ claims. Defendants claim that their written policies and practices conform to the requirements of the salary basis test under California and federal law, and that the Contingent Employees are properly classified and paid as exempt employees under California and federal law. Defendants do not admit liability or wrongdoing through the Settlement, and the Settlement may not be construed or used as an admission by or against Defendants of any fault, wrongdoing or alleged liability.

B. Procedural History

On July 22, 2011, Plaintiffs filed this action in the United States District Court for the Northern District of California. (Dkt # 1.) On September 2, 2011, Plaintiffs filed an amended complaint alleging the following claims against Pro, Juniper, Juniper Networks Holdings International, Inc. and Juniper Networks (US), Inc. (1) failure to pay required overtime compensation under the FLSA; (2) failure to pay required overtime under California law; (3) failure to pay all wages due at termination under California law; (4) failure to provide accurate wage statement; (5) violations of California’s Unfair Competition Law; and (6) Violation of the Labor Code Private Attorneys General Act (PAGA). (Dkt. # 5.)

Acquisition; Sr. Talent Acquisition Consultant; University Relations/Diversity Recruiter; and University Relations/Diversity Recruiter II.

1 On September 27, 2011 the parties filed a stipulation requesting that this Court continue the
2 deadline for the parties Rule 26(f) Report and CMC conference because Defendant PrO retained
3 new counsel that required time to familiarize itself with the case. (Dkt. # 19.)

4 On November 7, 2011, Defendant Juniper answered. (Dkt. # 21.) On November 22, 2011,
5 the parties filed a stipulation dismissing without prejudice Juniper Networks Holdings
6 International, Inc. and Juniper Networks (US), Inc. (Dkt. # 27.) On November 15, 2011, the
7 parties executed an agreement to toll the FLSA statute of limitations for all absent collective action
8 members, pending mediation of the case. Rukin Decl., ¶ 7.

9 By November 15, 2011, PrO and Plaintiffs began discussing early resolution of the case.
10 On November 22, 2011, the parties filed a stipulation requesting a further continuance of the
11 deadlines for the Rule 26(f) Report and CMC to allow the parties time to focus on settlement
12 negotiations. (Dkt. #28.)

13 Beginning in early November, 2011 PrO provided Plaintiffs with information, data and
14 documents relevant to claims in the case. The information PrO disclosed included the total number
15 of putative class members, putative class member names and job titles, the number of workweeks
16 per class member and wage information. Rukin Decl., ¶ 8.

17 Plaintiffs propounded written discovery, including requests for production of documents
18 and interrogatories to Juniper and PrO. Defendants provided responses and several hundred
19 responsive documents in November 2011, including the contract for Contingent Workforce
20 Management between PrO and Juniper, the employee handbook, and Plaintiffs' employee files and
21 wage records. Rukin Decl., ¶ 9.

22 After extensive negotiations, Pro and Plaintiffs reached a tentative agreement of a proposed
23 hybrid and collective class action settlement on December 29, 2011, which resulted in a
24 Confidential Memorandum of Understanding. Rukin Decl., ¶ 10. The parties subsequently
25 conducted confirmatory interviews with putative class members. Rukin Decl., ¶ 11. On March 19,
26 2012, PrO and Plaintiffs finalized and signed the Settlement Agreement for which Plaintiffs seek
27 preliminary approval in this motion.

III. TERMS OF THE PROPOSED SETTLEMENT

The complete details of the Settlement are contained in the Settlement Agreement signed by the parties and attached as Exhibit 1 to the Declaration of Peter Rukin. The Settlement Agreement is between PrO and Plaintiffs. The following summarizes the Settlement Agreement's terms.

A. The Settlement Class

The Settlement Class is composed of the "California Class" and the "FLSA Class." The California Class consists of all persons employed by Pro Unlimited, Inc. in Covered Positions who worked at Juniper between July 22, 2007 and preliminary approval of the Settlement, and who do not submit a valid request for exclusion (i.e. opt out of the Settlement). Exh. 1, ¶ 2. The FLSA Class consists of all persons employed by Pro Unlimited, Inc. in Covered Positions who worked at Juniper between July 22, 2008 and preliminary approval of the Settlement, and who affirmatively opt in to the Settlement by cashing a settlement award check. Exh. 1, ¶ 2. The Covered Positions for both Settlement Classes include the following job titles: Agency Finance Management; Agency IT Management; Agency Marketing Management; Agency Recruiter; Agency Talent Acquisition; Agency Talent Acquisition-Recruiter; Contract Recruiter-APG; Contract Sr. Technical Recruiter; Manager, Contingent Workforce; Marketing Contractor; Recruiter; Sr. Recruiter; Sr. Talent Acquisition; Sr. Talent Acquisition Consultant; University Relations/Diversity Recruiter; and University Relations/Diversity Recruiter II (hereafter "Covered Positions"). Exh. 1, ¶ 2.

If a person worked in a Covered Position, but his or her name is not provided to the Claims Administrator, that individual shall not be deemed to be a member of the Settlement Classes for purposes of the settlement release. Exh. 1, ¶ 2.

In order to receive a settlement payment under the Settlement, members of the Settlement Classes do not need to submit a claim form. For the California class, if individuals do not opt-out, they will release their claims under the terms of the Settlement. For the FLSA Class, class members need only cash settlement checks to opt-in. Additionally, any Class Member whose notice is returned undeliverable with no forwarding address, after compliance with the Settlement

Administrator's mailing requirements, will be excluded from the Settlement Classes, will not be bound by the Settlement, and will not receive any Settlement Award. Exh. 1, ¶ 2.

B. Relief to the Settlement Class

The Settlement provides that Pro will pay \$1,250,000 (the "Maximum Settlement Amount") in settlement of the class claims. *Id.* ¶ 13. Payment for court-approved attorneys' fees and costs, court-approved enhancement awards to the Class Representatives, fees and expenses of the Claims Administrator, and payment of a PAGA penalty to the State of California will be deducted from the maximum total payment. Exh. 1, ¶ 14(c). The resulting Net Settlement Amount will be distributed to participating class members. *Id.* Defendant's share of the payroll taxes attributable to the wage portion of the Settlement Awards will be paid separately and in addition to the Maximum Settlement Amount. Exh. 1, ¶ 14(c).

Class members will be paid based on the total number of weeks worked in Covered Positions during the Class Period by all eligible Class Members. The amount to be paid per workweek to eligible Class Members will be calculated by dividing the Net Settlement Amount by total the number of weeks worked by all eligible Class Members; the amount paid per workweek to each eligible Class Member will be adjusted up or down by a percentage of each eligible Class Member's average weekly pay rate compared to the average weekly pay rate for all eligible Class Members during the Class Period. Exh. 1, ¶ 14(d).²

In the event there are any funds remaining in the Net Settlement Amount from un-cashed or expired checks, the following procedures will be followed: If the value of the un-cashed amount is less than \$30,000, the amount will be distributed to a *cy pres* beneficiary agreed to by the parties or decided by the Court. In the event the value of expired and un-cashed checks exceeds \$30,000, the amount shall be distributed as follows: (1) first to the remaining eligible Class Members who cashed their Settlement Award checks, up to an amount two times the amount of their initial settlement share; and (2) should any amount still remain, then to *cy pres* beneficiaries mutually

² Although each Class Members' settlement award will vary based on the number of work weeks and rate of pay, the approximate range each class member would recover per workweek under the Settlement is \$300 to \$1300. Rukin Decl. ¶ 14. The average number of workweeks worked by Class Members during the class period is 34 weeks. *Id.*

1 agreed to by the Parties and approved by the Court, with 50 percent paid to a beneficiary selected
2 by Plaintiffs and 50 percent paid to a beneficiary selected by Defendant. Exh. 1, ¶ 18.

3 **C. Settlement Notice, Claim, and Exclusion Procedures**

4 The parties have agreed, subject to Court approval, to a notice plan which includes
5 individual mailed notices that will provide the Settlement Class members with sufficient
6 information to make an informed decision about how and whether to participate in the proposed
7 settlement, object to the proposed settlement, or to exclude themselves from the Settlement Class.
8 Exh. 1, 17.

9 Within 15 days after preliminary approval of the Settlement, counsel for Defendant shall
10 provide the proposed Claims Administrator, Simpluris, Inc. each Class Member's name, last-
11 known address, last-known email addresses, social security number, and workweeks and average
12 weekly pay data during the Class Period. Simpluris shall obtain updated address information for
13 Class Members using a National Change of Address search, a "skip trace" search, and other means
14 that Simpluris customarily uses to locate class members, and then, within 30 days after preliminary
15 approval, shall mail to each Class Member the appropriate "Notice of Class Action Settlement." If
16 a Notice is returned with a forwarding address, Simpluris will immediately re-mail the Notice
17 using that address information. If a Notice is returned as undeliverable, Simpluris will perform a
18 search for a more current address and re-mail the documents. Exh. 1, ¶ 17(b).

19 The Notice of Class Action Settlement informs Class Members of all material terms of the
20 Settlement, including the amount they should expect to receive under the Settlement, the
21 procedures for participating in or objecting to the Settlement and the procedure for requesting
22 exclusion from the Settlement. Exh. 1, Exh. A. The Notice also explains to Class Members how
23 they can dispute the number of workweeks contained on their Claim Forms and includes the same
24 release of claims that is contained in the Stipulation of Settlement.

25 Class Members will have 45 days from the mailing of the Class Notice to object to or
26 request exclusion from the Settlement. Exh. 1, ¶ 17(c)-(d).

27 **D. Release of Claims**

In exchange for payment of the Settlement Amount, the Representative Plaintiffs, all FLSA Class Members who submit claims, and all California Class Members who do not opt-out of the Settlement will release all claims against PrO and Juniper that were alleged in this case or that reasonably arise out of the facts alleged in the case. Exh. 1, ¶ 19.

E. Class Representative Enhancement Payments, Attorneys Fees and Costs, and Settlement Administration

The Settlement provides that deducted from the Maximum Settlement Amount will be sums for each of the following: (1) service payments to the named Class Representatives, not to exceed \$25,000 each, and subject to approval by the Court; (2) the fees of the Settlement Administrator, not to exceed \$20,000; (3) Class Counsel's attorneys' fees and costs, not to exceed a total of 25% of the Settlement; and (4) payment of \$7,500 to the State of California Labor and Workforce Development Agency in connection with Plaintiffs' PAGA claim. Exh. 1, ¶ 14(c),(g)-(i).

F. Payment

Within 45 days after the Settlement becomes final, the Settlement Award checks will be mailed to class members. Settlement checks will remain valid for 90 calendar days from the date of issuance. Exh. 1, ¶ 18. Beginning 30 days after the settlement checks are mailed, Simpluris will contact all class members who have not yet cashed their settlement checks to confirm they received the checks. *Id.* Additionally, 60 days after the settlement checks are mailed, Simpluris will send a reminder postcard to all class members who have not cashed their settlement checks. *Id.*

IV. ARGUMENT

A. Preliminary Approval of the Settlement is Appropriate

The approval of a class action settlement is a two-step process under Fed. R. Civ. P. 23(e). *Armstrong v. Bd. Of School Dirs.*, 616 F.2d 305, 314 (7th Cir. 1980), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873, 875 (7th Cir. 1998). First, the Court must decide whether to grant preliminary approval of the settlement and order that notice of the terms of the settlement be sent to class members, including by determining whether the proposed settlement is "within the range of possible approval." *Id.* The purpose of the preliminary approval process is to determine whether the proposed settlement, when taken as a whole, is fundamentally fair, adequate, and

reasonable to the Class. *See Dunleavy v. Nadler (In re: Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 458 (9th Cir. 2000); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); *see also Dail v. George A. Arab, Inc.*, 391 F. Supp. 2d 1142, 1145 (M.D. Fla. 2005) (applying general class action settlement standards in FLSA case); *La Parne v. Monex Deposit Co.*, No. SACV 08-0302 DOC (MLGx), 2010 WL 4916606, at *1 (C.D. Cal. Nov. 29, 2010) (applying Rule 23(e) settlement standards in FLSA case).

The decision whether a proposed settlement is fair, adequate and reasonable to the class is committed to the Court's sound discretion. *See Hanlon*, 150 F.3d at 1026; *Officers for Justice v. Civil Service Com.*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied*, *Byrd v. Civil Service Comm'n*, 459 U.S. 1217 (1983); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1988). In exercising that discretion at the preliminary approval stage, the court should consider a variety of factors, including (1) whether the settlement was the product of collusion between the parties; (2) the strength of Plaintiffs' case; (3) the risk, expense, complexity, and duration of further litigation; (4) the risk of maintaining class certification; (5) the amount of settlement; (6) investigation and discovery; and (7) the experience and views of counsel. *Hanlon*, 150 F.3d at 1026. The Court also applies its discretion in light of the judicial policy favoring settlement of complex class action litigation. *Officers for Justice*, 688 F.2d at 625 ("Voluntary Conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation."). As discussed below, application of the relevant factors here supports preliminary approval of this Settlement.

1. The Settlement is the Produce of Serious, Informed, Non-Collusive Negotiation

As settlement inherently involves a potentially hard-fought compromise, a court should generally presume fairness at the preliminary stage of approval of a class action settlement so long as the settlement is recommended by experienced class counsel after arms-length bargaining. *Berenson v. Faneuil Hall Marketplace*, 671 F. Supp. 819, 822 (D. Mass. 1987) ("where . . . a proposed class settlement has been reached after meaningful discovery, after arm's-length negotiation, conducted by capable counsel, it is presumptively fair"); *Cicero v. DirecTV, Inc.*, No.

1 EDCV 07-1182, 2010 WL 2991486, at * 3 (C.D. Cal. July 27, 2010) (same).

2 In this case, the Settlement Agreement is the result of intensive, arm's-length negotiations
 3 involving experienced employment counsel well-versed in both the substantive law and class
 4 action litigation procedures and familiar with the legal and factual issues of this case in particular.
 5 Rukin Decl., ¶¶ 3-6. Negotiations were conducted after relevant discovery and information was
 6 exchanged and over the course of several months. Rukin Decl., ¶¶ 6-12. Further, Plaintiffs
 7 conducted confirmatory interviews with putative class members after a tentative agreement was
 8 reached. Rukin Decl., ¶ 11. "Such negotiations are highly indicative of fairness" of the proposed
 9 Settlement. *In re Immune Response Securities Litigation*, 497 F. Supp. 2d 1166, 1171 (S.D. Cal.
 10 2007).

11 **2. The Settlement Contains No Obvious Deficiencies and Falls Within the** 12 **Range of Possible Approval**

13 In deciding whether the proposed settlement is adequate and falls within the range of
 14 possible approval, courts look to the strength of plaintiffs' claims, the risks plaintiffs' faced in
 15 pressing forward with their claims, and "plaintiffs' expected recovery balanced against the value of
 16 the settlement offer." *Vasquez v. Coast Valley Roofing, Inc.*, 670 F. Supp. 2d 1114, 1125 (E.D.
 17 Cal.2009), *quoting In re Tableware Antitrust Litigation*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal.
 18 2007). The Settlement's adequacy must be judged as "a yielding to absolutes and an abandoning
 19 of highest hopes" Naturally, the agreement reached normally embodies a compromise; in
 20 exchange for the saving and cost and elimination of risk, the parties each gave up something they
 21 might have won had they proceeded with litigation." *Officers for Justice*, 688 F.2d at 624 (*quoting*
 22 *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)).

23 Here, an analysis of the Settlement shows that there are no grounds to doubt its fairness,
 24 that it has "no obvious deficiencies" and it is "within the range of possible approval." *In re*
 25 *Vitamins Antitrust Litig.*, No. MISC 99-197 (TFH), MDL 1285, 2001 WL 856292, at *4 (D. D.C.
 26 July 25, 2001).

27 **a. The Strength of Plaintiffs' Case and the Risk, Expense,** 28 **Complexity, and Likely Duration of Further Litigation Support**

Preliminary Approval

Plaintiffs contend that the structure of Defendants' pay practices allows for reductions in pay based on the quantity of work available, such that they allegedly do not receive a guaranteed weekly salary within the meaning of the salary basis requirement under the FLSA and California law, and that Class Members were misclassified as exempt from overtime laws.

While Plaintiffs contend that the data and documents produced in discovery, as well as the putative class member interviews, support their allegations that Contingent Employees were wrongly treated as exempt employees, they recognize that a finder of fact could reach a different conclusion. A trier of fact might determine that there were no reductions in pay based on the quantity of work performed, that such reductions were not sufficient to a failure to pay Contingent Employees on a salary basis, that Class Members' duties render them exempt, and that Contingent Employees were properly classified and paid as exempt employees. Without conceding that any of these results would be correct or appropriate, Plaintiffs recognize the risk of possible adverse outcomes.

Also, while Plaintiffs vigorously contend that the claims in this case are appropriate for class certification, it is expected that Defendant would contest certification in the absence of this Settlement. This Settlement avoids the risk that Plaintiffs would not prevail on their Rule 23 motion or defeat any decertification motion under 29 U.S.C §216(b). In sum, this Settlement avoids that substantial uncertainty, while ensuring that Class Members receive substantial consideration now for a release of their claims. See Rukin Decl., ¶ 13.

b. The Settlement Consideration and Plan of Allocation Are Fair and Reasonable

The Settlement sum is fair and reasonable in light of the risks of further litigation. Based on Plaintiffs' counsel's valuation and overtime hours estimates, the Net Settlement Fund ranges between forty and eighty of the alleged damages potentially recoverable by the Class—a significant recovery in light of the risks of litigation. Rukin Decl., ¶ 13. Further, this Settlement affords relief to Class Members who likely would never have filed individual claims for unpaid overtime wages. Class Members may also have been reluctant to file individual claims because

1 they fear retaliation in an industry where they are frequently hired by the same Defendants. Under
 2 the circumstances of the case, the amount of the Settlement is fair, adequate, and reasonable. *See*
 3 *Dunleavy v. Nadler*, 213 F.3d 454, 459 (9th Cir. 2000) (finding a recovery of one sixth (16.67%) of
 4 the potential recovery adequate in light of the plaintiff's risks).

5 The plan of allocation of the Settlement to Class members is also fair and reasonable.
 6 After consultation the class representatives and joint interviews of class members, Counsel have no
 7 reason to believe that any one Contingent Worker Class Member would have worked materially
 8 more hours, on average, than any other Contingent Worker Class Member. For these reasons, the
 9 Settlement provides that the Settlement shall be allocated based on workweeks worked by Class
 10 Members (a standard allocation methodology in wage and hour cases).

11 **3. The Attorneys' Fees and Costs that Plaintiffs Intend to Request Are** 12 **Reasonable**

13 The Settlement provides that, prior to the Final Approval Hearing, Class Counsel may
 14 petition the Court for a total award of fees and costs of \$312,500 (25% of the total amount paid
 15 under the Settlement). Rukin Decl., Exh. 1, ¶ 16. Plaintiffs submit that this provision is fair and
 16 reasonable given the time and expenses that Plaintiffs' counsel have devoted to this case and the
 17 result they have achieved for the Class. Class Counsel's fees will be tied directly to the amount
 18 that is actually paid out to the Class, and is within the range of reasonableness under Ninth Circuit
 19 authority. *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000) (twenty-five percent of the
 20 recovery is "benchmark" for attorneys' fees under the percentage of recovery approach.); *Six (6)*
 21 *Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (usual common
 22 fund recovery is 20-30 percent). The proposed Notice informs Class Members of the maximum
 23 amount that may be awarded to Class Counsel for their fees and costs. The proposed Preliminary
 24 Approval Order provides that Class Counsel shall file their application for fees and costs 30 days
 25 prior to the final approval hearing and allows Class Members to file objections to the application
 26 up to 10 days before final approval. Rukin Decl., Exh. 1, Ex. B.

27 **4. The Proposed Service Awards to Class Representatives Are** 28 **Reasonable**

1 The proposed incentive awards are consistent with a fair, just, and adequate settlement.
 2 Rukin Decl., ¶¶ 15-16. In the Ninth Circuit, “[i]ncentive awards are fairly typical in class action
 3 cases.” *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). “Courts routinely
 4 approve incentive awards to compensate named plaintiffs for the services they provided and the
 5 risks they incurred during the course of the class action litigation.” *Cullen v. Whitman Med. Corp.*,
 6 197 F.R.D. 136, 145 (E.D. Pa. 2000); *Smith v. Tower Loan of Miss., Inc.*, 216 F.R.D. 338, 368 (D.
 7 Miss. 2003) (same). To assess whether an incentive payment is appropriate, courts balance “the
 8 number of named plaintiffs receiving incentive payments, the proportion of the payments relative
 9 to the settlement amount, and the size of each payment.” *Staton v. Boeing*, 327 F.3d 938, 977 (9th
 10 Cir. 2003).

11 The Settlement provides that the three representative Plaintiffs Michael Lazarin, Steven
 12 Kohler, and Paul Capano, shall each receive a service award of \$25,000 subject to Court approval.
 13 The payments to these three individuals are in recognition of the time and effort that they invested
 14 in assisting Plaintiffs’ counsel with the investigation, prosecution, and settlement of the case, and
 15 accepting the risk of an adverse result. Rukin Decl., ¶¶ 15-16. Each of the Plaintiffs spent
 16 significant time assisting Plaintiffs’ Counsel with pre-filing investigation, reviewing documents,
 17 and discussing the claims in the case. Rukin Decl., ¶ 15. In addition, the higher payments to the
 18 representative Plaintiffs are in recognition of the additional obligation that they have been required
 19 to accept in this Settlement because they executed a general release of all known and unknown
 20 claims that they may have against Defendants. Rukin Decl., ¶ 16. Finally, the service awards to
 21 the Plaintiff are in recognition of the risk of retaliation they undertook in prosecuting this action
 22 when due to the nature of their work, they are often re-hired by the same Defendants. Rukin Decl.
 23 ¶ 16.

24 Further, the service award that Plaintiffs seek for the work they have performed in this case
 25 are consistent with the range of incentive awards approved by other federal judges in class actions.
 26 “Numerous courts in the Ninth Circuit and elsewhere have approved incentive awards of \$20,000
 27 or more where . . . the class representative has demonstrated a strong commitment to the class.”
 28

1 *Garner v. State Farm Mut. Auto. Ins.*, No. CV 08 1365 CW (EMC), 2010 WL 1687832, at *17 n.8
 2 (N.D. Cal. Apr. 22, 2010) (collecting cases). *See also Van Vracken v. Atlantic Richfield Co.*, 901 F.
 3 Supp. 294, 299-300 (N.D. Cal. 1995) (approving an incentive award of \$50,000 to named
 4 plaintiff); *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322 (E.D. Pa. 2007)
 5 (incentive award of \$75,000 to one named plaintiff); *Bynum v. Dist. Of Columbia*, 412 F. Supp. 2d
 6 73 (D. D.C. 2006) (incentive awards of \$200,000 divided among six named plaintiffs); *Van*
 7 *Vrancken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995) (incentive award of \$50,000
 8 to one named plaintiff).

9 **5. The Court Should Appoint Simpluris, Inc., to Administer the** 10 **Settlement Claims**

11 To ensure the fair and efficient administration of the Settlement, the Court should appoint
 12 Simpluris, an experienced claims administrator, to distribute the Notice and administer claims
 13 under the Settlement Agreement. Rukin Decl., ¶ 17. In return for its work, Plaintiffs anticipate
 14 that Simpluris will be paid no more than \$25,000 from the Settlement Amount to compensate it for:
 15 verifying Class Members' mailing addresses; mailing Notice via First Class Mail to the
 16 approximately 50 Class Members and potentially re-mailing returned notices to updated addresses;
 17 compiling and calculating Class Members' settlement payments; addressing any Class Members'
 18 objections to the pre-printed information on the Claim Form; communicating with counsel to
 19 determine settlement payments; distributing settlement checks to Class Members; and tax
 20 reporting.

21 **B. Class and Collective Action Certification are Proper**

22 Here, the parties are seeking to settle a California state law wage and hour class pursuant to
 23 Fed. R. Civ. P. 23 as well as a FLSA collective action class pursuant to 29 U.S.C. §216(b). As
 24 discussed below, the standards for establishing a § 216(b) collective action are less stringent than
 25 those for a Rule 23 class. However, even applying the more stringent Rule 23 standards, both the
 26 California Class and the FLSA Class meet these standards. *See Misra v. Decision One Mortg. Co.*,
 27 No. SA CV 07-0994 DOC (RCx), 2009 WL 4581276, at *4 (C.D. Cal. Apr. 13, 2009) (applying
 28 Rule 23 standards to certification of FLSA collective action for settlement purposes); *La Parne v.*

1 *Monex Deposit Co.*, No. SACV 08-0302 DOC (MLGx), 2010 WL 4916606, at *1 (C.D. Cal. Nov.
2 29, 2010) (same).

3 **1. Standards governing Approval of Settlement Classes**

4 In the context of granting preliminary approval of the Settlement, the Court must make a
5 threshold determination as to whether the proposed Class meets the Rule 23 requirements. *See*
6 *MANUAL FOR COMPLEX LITIGATION, FOURTH* § 21.632 (2004); *Amchem Prods., Inc. v.*
7 *Windsor*, 521 U.S. 591, 620 (1997). Namely, the Court must determine whether each proposed
8 class satisfy the requirements that: (1) the individuals in the settlement class is so numerous that
9 joinder would be impracticable; (2) there is a question of law or fact common to the class; the
10 named plaintiffs' claims are typical of the claims of the absent settlement class members; and (4)
11 Plaintiffs and their counsel will adequately and fairly represented the interests of the absent
12 settlement class members. *Hanlon*, 150 F.3d at 1019. "In addition... the parties seeking class
13 certification must also show that the action is maintainable under Fed. R. Civ. P. 23(b)(1), (2), or
14 (3)." *Id.* at 1022.

15 Under the FLSA, a collective action may be maintained by an employee or employees on
16 behalf of others who are similarly situated. 29 U.S.C. §216(b). In the initial "conditional"
17 certification phase, the "similarly situated" standard is more permissive than Rule 23 and requires
18 only that the named plaintiffs make a "modest factual showing sufficient to demonstrate that [he or
19 she] and potential plaintiffs together were victims of a common policy or plan that violated the
20 law." *Scholtisek v. Eldre Corp.*, 229 F.R.D. 381, 387 (W.D.N.Y. 2005). Although this Settlement
21 was negotiated before any motion for conditional certification, it provides that FLSA Class
22 Members who desire to participate in the Settlement may opt-in by cashing their settlement checks,
23 and only those Class Members who affirmatively opt-in to the Settlement release their claims.
24 Under these circumstances, the Court should approve the settlement if it is "present[ed] to the
25 district court [as] a proposed settlement, the court may enter a stipulated judgment after
26 scrutinizing the settlement for fairness." *Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350, 1353
27 (11th Cir. 1982).

1 Based on the applicable standards, as further discussed below, the Court should certify the
 2 California Class and FLSA Class for settlement purposes. Defendants do not oppose and have
 3 agreed to certification for settlement purposes.

4 **2. The Settlement Class Satisfies the Requirements of 23(a)**

5 The proposed California Class and FLSA Class each satisfy all the requirements of Rule
 6 23(a). First, the classes are sufficiently numerous to satisfy the requirements of Rule 23(a)(1). The
 7 Ninth Circuit has held that a class of 20 persons satisfies numerosity, *Rannis v. Recchia*, No. 09-
 8 55859, 2010 WL 2124096, at *5 (9th Cir. May 27, 2010), and courts have generally found the
 9 numerosity requirement satisfied when a class includes at least 40 members. *EEOC v. Kovacevich*
 10 “5” Farms, No. CV-F-06-165 OWW/TAG, 2007 WL 1174444, at *21 (E.D. Cal. Apr.19, 2007).
 11 Here, the proposed Classes of approximately 44 satisfy the numerosity requirement. Exh. 1, ¶14.c.

12 Second, Rule 23(a)(2) is satisfied because there is a question of law or fact common to each
 13 class. “Commonality only requires a single significant question of law or fact,” the resolution of
 14 which is “apt to drive the resolution of the litigation.” *Mazza v. Am. Honda Motor Co., Inc.*, 666
 15 F.3d 581, (9th Cir. 2012), citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).
 16 Here, such common questions include: whether allegedly subjecting Contingent Employees wages
 17 to deductions based on the availability of work evidences an intent not to pay Contingent
 18 Employees on a salary basis; whether the salary basis requirement allows employers allegedly to
 19 reduce employee’s weekly pay so long as the employee is guaranteed a weekly paycheck; and
 20 whether Defendants’ written policies support their position that Contingent Employees were paid
 21 on a Salary Basis.

22 Third, the typicality requirement of Rule 23(a)(3) is satisfied because the claims raised by
 23 Plaintiffs are typical of the claims asserted on behalf of the class. Typicality is established if
 24 “representative claims are reasonably co-extensive with those of absent class members; they need
 25 not be substantially identical.” *Hanlon*, 150 F.3d at 1020. The claims of the representative
 26 Plaintiffs in this case arise out of the same factual and legal circumstances as the claims of each
 27 class member in the respective settlement classes. Like all Contingent Employees, Plaintiffs were
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1 classified as exempt, subject to the same timekeeping policies and practices, and the same alleged
2 failure to pay them on a salary basis.

3 Fourth, Plaintiffs and Plaintiffs' counsel satisfy the adequacy requirement of Rule 23(a)(4),
4 as well as the requirements of Rule 23(g). Rule 23(a)(4) requires that the parties fairly and
5 adequately protect the interests of the class. The adequacy requirement is met where the
6 representatives: (1) will vigorously prosecute the interests of the class through qualified counsel,
7 and (2) have common, and not antagonistic interests, with unnamed members of the class. *Hanlon*,
8 150 F.3d at 1020. Rule 23(g)(1)(C) states that "[i]n appointing lass counsel, the court (i) must
9 consider: [1] the work counsel has done in identifying or investigating potential claims in the
10 action, [2] counsel's experience in handling class actions, other complex litigation, and claims of
11 the type asserted in the action, [3] counsel's knowledge of the applicable law, and [4] the resources
12 counsel will commit to representing the class."

13 Here, Plaintiffs' counsel Rukin Hyland Doria & Tindall LLP have actively identified,
14 investigated and prosecuted the claims that are the subject of this Settlement. Rukin Decl., ¶¶ 6-12;
15 Plaintiffs' counsel have extensive experience in class action litigation, including class overtime
16 claims, and are thus well-qualified to be appointed as Class Counsel. See Rukin Decl., ¶¶ 3-5.
17 Proposed class counsel has been appointed class counsel in other cases on numerous occasions. *Id.*
18 Plaintiffs' counsel have demonstrated that they have the ability and resources to vigorously pursue
19 the claims asserted in this litigation—having already invested significant resources to investigate
20 the case and analyze the data produced by Defendant. Rukin Decl., ¶ 18.

21 Finally, the interests of the named Plaintiffs and absent Class Members are not antagonistic.
22 Plaintiffs have the same claims to unpaid overtime as the members of the Settlement Class, have
23 suffered the same injury, and are entitled to the same remedy. Beyond the modest enhancements
24 requested, Plaintiffs will receive a portion of the Settlement on the same terms as all other
25 Members of the proposed Class. Plaintiffs' counsel is aware of no conflicts between the named
26 Plaintiffs and Class Members that would render them inadequate class representatives.

27 For all these reasons, Plaintiffs' counsel and named class representatives meet the adequacy
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1 requirement of Rule 23(a)(4), and both law firms should be appointed as Class Counsel pursuant to
2 Rule 23(g).

3 **3. The Settlement Class Meets the Requirements of Rule 23(b)(3)**

4 The Settlement Class meets the requirements of Rule 23(b)(3), because common questions
5 “predominate over any questions affecting only individual members,” and class resolution “is
6 superior to other available methods for the fair and efficient adjudication of the controversy.”

7 First, the Class satisfies the predominance requirement. “The Rule 23(b)(3) predominance
8 inquiry tests whether the proposed classes are sufficiently cohesive to warrant adjudication by
9 representation.” *Hanlon*, 150 F.3d at 1022. “When common questions present a significant aspect
10 of the case and they can be resolved for all members of the class in a single adjudication, there is a
11 clear justification for handling the dispute on a representative rather than on an individual basis.”
12 *Id.* Here, there is sufficient cohesion to warrant class adjudication. As discussed above, the salary
13 basis claim in this case by its nature turns on what legal conclusions could be drawn from
14 Defendants’ payroll policies and practices and those common issues predominate over any
15 questions peculiar to individual Class Members. *See Scholtisek*, 229 F.R.D. at 393 (finding Rule
16 23(b)(3) satisfied in salary basis case; “Germane to all class members’ claims is the factual issue of
17 whether Eldre has a practice of making certain deductions from the pay of salaried employees, and
18 the legal issue of whether that practice is lawful.”).

19 Second, Rule 23(b)(3) is satisfied because resolution of the issues in this case on a class
20 wide basis is “superior to other available methods for the fair and efficient adjudication of the
21 controversy.” The alternative to a single class action—numerous individual actions—would be
22 inefficient and unfair. *Lerwell v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978);
23 *Hanlon*, 150 F.3d at 1023 (“many claims [that] could not be successfully asserted individually...
24 would not only unnecessarily burden the judiciary, but would prove uneconomic for potential
25 plaintiffs.”). Class adjudication is particularly appropriate here given that the core evidence in the
26 case is the identical payroll practices and policies for all Class Members, and it is particularly
27 inefficient to require individual adjudications of modest value claims in the face of such common
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evidence and legal questions.

C. The Proposed Notice is Adequate Such that the Court Should Order Distribution of the Notice to Class Members

Under Rule 23(e), the Court “must direct notice in a reasonable manner to all class members who would be bound by a propos[ed settlement].” FED. R. CIV. P. 23(e)(1). Class Members are entitled to receive “the best notice practicable” under the circumstances. *Burns v. Elrod*, 757 F.2d 151, 154 (7th Cir. 1985). Notice is satisfactory “if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.” *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (internal citations omitted). Moreover, notice that is mailed to each member of a settlement class “who can be identified through reasonable effort” constitutes reasonable notice. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974).

The proposed Notice and notice plan satisfy the requirements of Rule 23(e) and due process. The Notice clearly explains the nature of the action and the terms of Settlement. It identifies the Maximum Settlement Amount to be paid by Defendant, the settlement payment that the Class Member will receive if he or she participates in the Settlement, how settlement payments are calculated, and how the Class Member may claim his or her portion of the Settlement. It further explains how to exclude oneself from the Settlement, how to object to the Settlement, and what impact a Class Member’s action or inaction will have on the release of claims.

The proposed Notice plan ensures that the parties will make reasonable efforts to mail individual notice to all Class members. Defendants will provide Simpluris with each Class member’s last known address, phone number, and the last four digits of his or her social security number. Simpluris will mail the Notice and Claim Form to the last known address of each Class Member, after first updating the address using the U.S. Postal Service’s National Change of Address (NCOA) database as well as Accurant “skip-trace” search software. In addition, Simpluris will conduct a skip-trace for all returned Notice packets, make phone calls to class members who have not cashed their settlement award 30 days after mailing to confirm receipt, and send postcards to Class Members who have not submitted claims or excluded themselves from the Settlement 60

1 after mailing the settlement checks. This is the best notice practicable. *See Misra*, 2009 WL
 2 4581276 at *9 (use of NCOA database and appropriate skip tracing followed by mailed notice is
 3 the ‘best notice that is practicable under the circumstances.’”). Because the content of the Notice
 4 and the method for distributing it to the Class Members fulfill the requirements of Rule 23 and due
 5 process, the Court should approve the proposed notice and the procedures for distributing it.

6 **D. The Court Should Set a Final Approval Hearing**

7 Finally, the Court should set a hearing for final approval of the Settlement on a date
 8 appropriately scheduled to follow the date by which Class Members must file objections to the
 9 Settlement and Plaintiffs’ counsel’s request for attorneys’ fees. The parties propose that if the
 10 Court grants preliminary approval on June 5, 2012, the final papers in support of the Settlement,
 11 including Plaintiffs’ counsel’s application for attorneys’ fees and costs, be filed and served no later
 12 than September 14, 2012 and that the hearing on final approval of the Settlement be set on or after
 13 October 16, 2012.

14 **V. CONCLUSION**

15 For the foregoing reasons, Plaintiffs respectfully request that the Court: (1) grant
 16 preliminary approval of the proposed settlement; (2) conditionally certify for settlement purposes
 17 an FLSA Settlement Class; (3) conditionally certify for settlement purposes a California Class; (4)
 18 approve the form, content, and method of distribution of the Notice and Proof of Claim Form; (5)
 19 appoint Simpluris as the Claims Administrator pursuant to the Settlement Agreement; (6) appoint
 20 Rukin Hyland Doria & Tindall LLP as settlement Class Counsel; and (7) schedule a hearing
 21 regarding final approval of the proposed Settlement and Class Counsel’s request for attorney’s fees
 22 and costs.

23 DATED: April 20, 2012

RUKIN HYLAND DORIA & TINDALL LLP

25 By /s/
 26 Peter Rukin
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